SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 402

OWEN A. FRANK AND DOROTHEA FRANK,
Petitioners,

vs.

THE COUNTY OF SCOTTS BLUFF, NEBRASKA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA AND BRIEF IN SUPPORT THEREOF.

THOMAS M. MORROW,
PAUL T. MILLER,
Counsel for Petitioners.

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No. 402

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THE COUNTY OF SCOTTS BLUFF, NEBRASKA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

Come now Owen A. Frank and Dorothea Frank, petitioners, and for the purpose of obtaining a writ of certiorari directed to the Supreme Court of the State of Nebraska, respectfully show to this Honorable Court:

I.

Nature of Action.

On February 7, 1941, the respondent County of Scotts Bluff filed its amended petition in the District Court of Scotts Bluff County, Nebraska, to foreclose a tax sale certificate issued by the County Treasurer of said county on all that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West of the 6th Principal

Meridian, lying south of the Winters Creek Canal except 3 parcels aggregating 18.88 acres. In the tax sale certificate the land was described as "Pt. NW¼, Sec. 24, Tp. 22, Range 55, acres 150.4", and Owen Frank was designated as owner of said real estate. The certificate included, among others, taxes for the years 1919 to 1929, both inclusive, with the exception of the years 1927 and 1928.

The defendants, Owen Frank and Dorothea Frank, filed an answer and cross petition in which they contested the validity of the purported taxes levied upon said real estate for the years 1919 to 1929, inclusive, on the ground that the land was assessed in two separate tracts of equal acreage to two separate owners, although it was all owned by Owen Frank, said descriptions being interchangeable, so as to make it impossible to identify either tract.

Upon the trial of said cause, the District Court entered a decree ordering the entire tract sold en masse for the satisfaction of the combined liens on the two separately assessed tracts (R. 13 to 19 inc.). From this decree petitioners appealed to the Supreme Court of Nebraska where, by an opinion filed January 15, 1943, said decree was affirmed (142 N. 698, R. 51 to 57, inc.).

After said cause was remanded to the District Court, said entire tract of land was sold en masse under said decree (R. 19 to 22, inc.). Under the law of Nebraska a judicial sale of real estate is not complete until confirmed by an order of court. Petitioners filed objections to the confirmation of said sale, containing, among others, the following grounds (2(d)): "The decree and order of sale are in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States" (R. 24, 25) and (3(d)). "It was contrary to and in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States" (R. 25). After a hearing the District Court, on May 24, 1943, overruled said objections and confirmed said sale and

ordered a deed issued to the purchaser. From the decree of confirmation petitioners appealed to the Supreme Court of Nebraska, where, on March 31, 1944, said decree was affirmed. Petitioners then filed in said court a motion and brief for re-hearing, containing, among others, the following ground:

> "The decree and order of confirmation and the affirmance thereof deny to the appellants the equal protection of the law guaranteed to them by Section I of the Fourteenth Amendment to the Constitution of the United States" (R. 58).

On May 19, 1944, said motion was overruled by the Nebraska Supreme Court without opinion, and, on application of petitioners, it was ordered that the mandate of said court to the trial court be withheld until August 18, 1944, pending application for review by this Honorable Court.

II.

Statement as to Jurisdiction.

(a). The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Section 237 of the Judicial Code as amended, Title 28, Chapter 9, Section 344(b), U. S. C. A.:

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had. * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution. * * * "

(b). The right, privilege and immunity specially set up and claimed by petitioners is based on the due process and

equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. Petitioners are not attacking the validity of any statute but claim that the decree of the District Court of Scotts Bluff County, Nebraska, as affirmed by the Supreme Court of Nebraska, the highest court in which a decision of said matter could be had in said state, deprived the petitioners of the benefits conferred by Sections 77-2043 and 77-2045, Compiled Statutes of Nebraska, 1929, as construed in the cases of *Taylor* v. *Evans*, 106 N. 233, 183 N. W. 89, and *City of Scottsbluff* v. *Acton*, 135 N. 636, 283 N. W. 374, which decisions were not overruled in this case and still remain the law in Nebraska.

(c). The order of the District Court of Scotts Bluff County, Nebraska, confirming the tax sale and overruling petitioners' objections thereto was made and entered on the 24th day of May, 1943, and affirmed by the Supreme Court of Nebraska on the 31st day of March, 1944, and petitioners' motion for re-hearing was overruled by the Supreme Court of Nebraska on May 19, 1944.

III.

Question Presented.

The following facts established by the record show the nature and the manner in which the Federal question was presented:

1. The undisputed record shows that from May, 1906, to February, 1916, Clifton R. DeMott and William Frank owned, as tenants in common, all that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West, south of Winter Creek Canal, containing 150.4 acres; that the portion of said quarter-section north of said canal containing 8.41 acres was, during said time, owned by Thomas Shields; that in February, 1916, William Frank, by acquir-

ing DeMott's interest, became the sole owner of the portion of said quarter-section south of said canal; that in February, 1925, William Frank conveyed said real estate to the petitioner, Owen Frank, who continued to own the same until after all of the taxes involved in this case had been levied thereon; that for the years 1919 to 1929, inclusive, the land owned by petitioner, Owen Frank and his immediate grantor, was assessed for taxation in two separate tracts, separately described, equal acreage, unequal valuations and unequal amounts of tax for each tract for each year. The assessment records pertaining to said quarter-section for the years 1919 to 1929, inclusive, are substantially as shown by the 1920 record which is as follows:

Name of Owner	Description Pt. of Sec.	Sec.	Twp.	R.	Total Acres	Assessed No.	Assessed Value
DeMott, L. S.....	Pt. NW¼	24	22	55	75.2	75	1960
Frank, William....	Pt. NW¼	24	22	55	75.2	75	3061
Shiels, Thomas.....	Pt. NW¼	24	22	55	8⅘	8⅘	272

(Exhibits 4 to 8, R. 32 to 36, 52)

2. On March 21, 1938, the County Treasurer of Scotts Bluff County, Nebraska, issued and delivered to said county a tax sale certificate embracing under one description all of the land of the petitioners so separately assessed in the names of L. S. DeMott and William Frank, combining in said certificate the aggregate amount of the separate tax items for said years 1919 to 1929, inclusive, under the description "Pt. NW¼, Section 24, Township 22, Range 55, acres 150.4" (R. 31).

3. The original decree of foreclosure entered on February 16, 1942, contained no finding as to the amount of the taxes separately assessed and due upon each of the two separate tracts purporting to be described in the assessment rolls and tax lists of said county, but did contain a finding that there was due to the plaintiff the sum of $24,657.89, with interest at the rate of 7% per annum from the date of said

decree, upon all that part of the Northwest Quarter Section 24, Township 22, Range 55, West of the 6th Principle Meridian, lying south of the Winter Creek Canal, except three tracts aggregating 18.88 acres, and that said sum constituted a lien upon said real estate, and said decree directed the sale of the total combined acreage, except said 18.88 acres, for the collection of said sum (R. 13 to 19).

4. The Supreme Court of Nebraska found in its opinion on appeal from the said decree of foreclosure that the assessment for each of the years 1919 to 1929, inclusive, was substantially as shown in Paragraph 1 above; that the officials carried the ownership of the land south of the canal under two names, equal acreage and unequal values, when in fact the land was owned entirely by one party; that the description and acreage remained constant through the years, but the value of each tract was different for each year and different as to each tract each year. After making said findings, said court stated petitioners' contention as follows:

> "In 1937 notice of tax sale was made wherein this land was described as 'Pt. N. W. ¼, 24-22-55'. The county treasurer issued a certificate of tax sale wherein this land was described as 'Pt. N. W. ¼, Sec. 24, Twp. 22, Range 55, acres 150.4' " (142 N. 701).

The only question decided on that appeal was that the taxes levied upon said real estate were valid. Sec. 77-2045, Compiled Statutes of Nebraska, 1929, was not referred to in the opinion on that appeal, nor was the jurisdiction of the court to enter a decree establishing a lien upon said entire tract for the aggregate amount of the taxes upon each of the parcels so separately assessed discussed or decided.

5. Sec. 77-2043, Compiled Statutes of Nebraska, 1929, provides that where several tax liens against several

separately assessed tracts of land are included in one petition for the foreclosure of said liens, the court must, in its decree, ascertain and determine the amount of taxes, interest and costs chargeable to each particular tract. Section 77-2045 of said Statutes provides that no lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land, nor shall any surplus proceeds of sale of one lot or parcel of land be applied to the payment of taxes or charges against any other lot or parcel of land. Both of said sections were in force many years prior to the issuance of the tax sale certificate involved in this case.

Prior to the issuance of said tax sale certificate, said sections were construed in the cases of *Taylor* v. *Evans*, 106 N. 233, 183 N. W. 89, and *City of Scottsbluff* v. *Acton*, 135 N. 636, 283 N. W. 374. The holding in the *Taylor* case is embodied in the syllabus which is as follows:

> "In a suit to foreclose separate tax liens upon distinct tracts owned by the same person, the sale of all such tracts together to satisfy the combined amount of the several liens is prohibited by section 6565, Rev. St. 1913 (Sec. 77-2045, C. S. 1929), notwithstanding the proviso thereto, permitting the court to apply the proceeds of the sale of one tract to the payment of the lien upon another tract belonging to the same person. Such sale, being beyond the jurisdiction of the court to order or, by confirmation, to approve, is void and will be set aside in a collateral suit brought for that purpose."

City of Scottsbluff v. *Acton* was an action to foreclose a tax sale certificate issued by the County Treasurer of Scotts Bluff County, Nebraska, to the County of Scotts Bluff, which certificate had been assigned to the City of Scottsbluff, upon a triangular tract of land belonging to the defendant, Acton, containing approximately 17 acres. The tax sale certificate included the general taxes levied upon said entire tract and a sewer tax levied upon only the

south 150 feet of said tract. A decree was entered against the defendant, Acton, by default, foreclosing said tax sale certificate and determining that the aggregate amount of the general taxes levied upon all of said tract and the special assessments levied upon only a part of said tract constituted a lien upon said entire tract. No appeal was taken from this decree. The entire tract was advertised for sale under said decree for this aggregate amount of the general taxes and special assessments. The defendant objected to the confirmation of the sale on the ground that the tax sale certificate and the decree were void because they were in violation of Section 77-2043 and Section 77-2045, C. S., 1929, referred to above. Following the holding in the *Taylor* case, the court held that the County Treasurer had no authority to issue the tax sale certificate and that the court had no jurisdiction to enter said decree directing the sale of the entire tract for the collection of the special assessments which were levied upon only part of it, and that the same was void and subject to collateral attack.

At the time the tax sale certificate involved in this action was issued and the decree foreclosing the same entered, the above statutes, as construed in the above decisions, constituted the law of the state of Nebraska on the question involved in this case.

6. Upon the assumption that the law of Nebraska had been settled as shown in Paragraph 5 hereof, petitioners filed in the District Court objections to the confirmation of the sale under the decree herein alleging that the decree and the order of sale issued pursuant thereto were void for the following reasons, among others: that the County Treasurer was without authority to issue the blanket tax sale certificate combining the separate assessments and covering the entire tract of land which was so separately

assessed in separate parcels; that the District Court was without jurisdiction or authority to enter a decree directing the sale of the two separate parcels so separately assessed as one tract for the aggregate amount of the taxes assessed upon each of said tracts; that the Clerk of the District Court was without authority to issue an order of sale directing the sheriff to sell the two parcels so separately assessed for the years mentioned as one tract for the payment of the taxes separately assessed against each of said tracts; that the decree and order of sale are in violation of Section I of the Fourteenth Amendment to the Constitution of the United States; that said sale was void because in violation of Section 77-2045, C. S., 1929, and in violation of Section I of the Fourteenth Amendment to the Constituion of the United States.

The District Court entered a decree overruling said objections and confirming said sale from which decree petitioners appealed to the Supreme Court of Nebraska, and on said appeal contended, among other grounds for a reversal of said decree, that petitioners had been deprived of their property without due process of law and denied the equal protection of the laws, contrary to the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution. The Nebraska Supreme Court affirmed the decree of confirmation and in its opinion specifically rejected petitioners' contention that they had been deprived of any rights guaranteed to them by said Amendment (R. 50, 59), but said court did not overrule the cases of *Taylor* v. *Evans* or *City of Scottsbluff* v. *Acton* or either of them.

Within the time allowed, petitioners filed their motion for re-hearing which said motion was without opinion overruled by the Supreme Court of Nebraska.

IV.

Reasons Relied on for Allowance of Writ.

The decision in this case does not purport to change or modify the law as set out in Subdivision III(5) of this petition. Therefore, that law is in full force and effect. If that law had been applied to the facts in this case, as it had previously been applied in other cases to facts similar to the facts in this case, and probably will be applied in other cases involving similar facts, the court would have been compelled to hold that the tax sale certificate, the purported decree of foreclosure and the sale made pursuant thereto were all void. If the purported decree in this case was void, it follows that since the sale under it was held to be valid, petitioners were thereby deprived of their property without due process of law.

Since the facts in this case on which the Nebraska Supreme Court held that it had jurisdiction to enter a decree directing the sale of the petitioners' real estate are identical, or substantially identical, with the facts in the cases of *Taylor* v. *Evans* and *City of Scottsbluff* v. *Acton*, in which said court held that it had no such jurisdiction, and since those cases were not overruled but were expressly approved and made applicable to all subsequent cases based on the same or a similar state of facts, the decision in this case singled out the petitioners as the only persons to whom the law announced in the previous decisions of said court should not apply, and said decision thereby deprived petitioners of the equal protection of the laws, contrary to Section I of the Fourteenth Amendment.

It therefore follows that petitioners were, by the decision in this case, deprived of their property without due process of law, or they were deprived of the equal protection of the law contrary to said Amendment.

As shown in subdivision (f) (11) of petitioners' brief in support of this petition, this case does not fall within the rule that the Fourteenth Amendment does not guarantee uniformity of judicial decisions or immunity from judicial error.

For these reasons, your petitioners respectfully submit that this Court should issue a writ of certiorari directed to the Supreme Court of Nebraska for a review of said decision of said court, and that upon reviewing said decision, this Court should restore to your petitioners the rights guaranteed to them by said Section 1, Article XIV, of the Constitution of the United States of which they have been deprived by said decision.

Wherefore your petitioners respectfully pray that a writ of certiorari may be issued out of and under the seal of this Court directed to the Supreme Court of the State of Nebraska commanding said court to certify and send to this Court on a day certain to be therein designated, a full and complete transcript of the record and all proceedings in said case, numbered and entitled on its docket, No. 31682, *County of Scotts Bluff, plaintiff and appellee* v. *Owen A. Frank and Dorothea Frank, defendants and appellants*, and that the decree of said court affirming the decree of the District Court of Scotts Bluff County, Nebraska, may be reviewed and reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

THOMAS M. MORROW,
PAUL T. MILLER,
Attorneys of Petitioners.

BRIEF.

A.

Reference to Opinion of State Court.

The opinion of the Supreme Court of Nebraska on the appeal from the decree of foreclosure is reported in 142 N. 698. The opinion on the appeal from the decree confirming the sale has not been officially reported but is found in 13 S. C. J. 216, 13 N. W. (2d), page 900. Both opinions are set out in full in the record, pages 51 to 57 and 47 to 51, respectively.

B.

Grounds on Which Federal Jurisdiction Is Invoked.

The grounds on which petitioners claim that the United States Supreme Court has jurisdiction in this case are set out in Paragraph 2 of the petition and will not be repeated at this point.

C.

Statement of the Case.

Paragraph 3 of the petition contains a statement of all the facts that are material to the consideration of the questions presented herein and such statement will not be repeated but said facts will be referred to at the appropriate places in the argument.

D.

Assignments of Error.

1.

The Supreme Court of Nebraska erred in holding that petitioners' contention, on appeal from the decree of confirmation of the sale, that said sale was in violation of Section 77-2045, Compiled Statutes of Nebraska, 1929, had been advanced on the appeal from the decree of foreclosure and determined adversely to petitioners.

2.

Said court erred in holding on the appeal from the decree confirming the sale of the real estate that it had been determined on the appeal from the decree of foreclosure that for the years 1919 to 1929, both inclusive, there had been but one tax lien upon the one tract ordered sold.

3.

Said court erred in ignoring and refusing to apply the rule laid down in *Taylor* v. *Evans* and *City of Scottsbluff* v. *Acton* that the court has no jurisdiction to order a sale en masse of property separately assessed in two or more tracts or to approve or confirm such sale.

4.

Said court erred in holding on the appeal from the decree of confirmation of said sale that its affirmance of the decree of foreclosure imparted validity to said decree so as to prevent a collateral attack upon it.

5.

The Nebraska Supreme Court erred in holding that the decree of confirmation of the sale of said real estate did not deprive petitioners of their property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

6.

The Nebraska Supreme Court erred in holding and adjudging that the decree of confirmation of the sale of said real estate did not deprive petitioners of the equal protection of the law, contrary to the Fourteenth Amendment of the Constitution of the United States.

E.

Summary of Argument.

I.

The inhibitions of the Fourteenth Amendment are binding on the state courts (Brief, Subdivision (f)(1)).

II.

The record shows beyond dispute that the land involved was separately assessed in two separate parcels for the years in question, and any inference to the contrary is unsupported by and directly contrary to the evidence (Brief, (f)(2)).

III.

The question here raised is not res judicata (Brief, (f)(2)).

IV.

The inference in the opinion (R. 50) that the land was assessed as one tract instead of two is directly contrary to the undisputed record (Brief, (f)(2)).

V.

Federal jurisdiction is not defeated by erroneous statements or inferences in the opinion of the Nebraska Supreme Court (Brief, (f)(3)).

VI.

The decree ordering the sale of the land en masse for the satisfaction of the total of the separate liens assessed against the two tracts was void for want of jurisdiction and subject to collateral attack (Brief, (f)(4)).

VII.

The decree of foreclosure being void, was not validated by its affirmance by the Supreme Court of Nebraska (Brief, (f)(5)).

VIII.

Since the decree and sale were in direct violation of the Nebraska statutes which have been uniformly held to deprive the state courts of jurisdiction to order a sale en masse of two separately assessed tracts of land for the satisfaction of the aggregate amount of taxes assessed against both tracts, such a sale and the decree of the Nebraska Supreme Court affirming the confirmation thereof by the trial court, deprived petitioners of their property without due process of law (Brief, (f)(6)).

IX.

The sale of the land in violation of the statutes and established precedents not overruled and the affirmance of the decree of confirmation deprived petitioners of the equal protection of the laws (Brief, (f)(7)).

X.

The Federal question was properly and timely presented (Brief, (f)(8)).

XI.

The judgment of the Nebraska Supreme Court cannot be sustained on any non-Federal ground (Brief, (f)(9)).

XII.

The question of reasonable classification is not here involved (Brief, (f)(7)).

XIII.

The Federal question is substantial (Brief, (f)(10)).

XIV.

Federal jurisdiction is not defeated under uniformity of decision rule (Brief, (f)(11)).

F.

Argument.

(1). Preliminary Statement.

The law is well settled that the inhibitions of the Fourteenth Amendment are binding upon the state courts as well as on other departments of the state.

Scott v. *McNeal*, 154 U. S. 34, 45, 38 L. ed. 896, 901;

Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226, 234, 41 L. ed. 979, 984;

Taylor v. *Beckham*, 178 U. S. 548, 599, 44 L. ed. 1187, 1208.

This court said in *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 76 L. ed. 1102, 52 S. Ct. 556:

> "The Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-Federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided.
>
> Ward v. Love County, 253 U. S. 17, 22, 64 L. ed. 751, 758, 40 S. Ct. 419.
>
> Enterprise Irrig. Dist. v. Farmers Mut. Canal Co., 243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct. 318.
>
> Fox River Paper Co. v. Railroad Commission, 274 U. S. 651, 655, 71 L. ed. 1279, 1283, 47 S. Ct. 669."

The applicability of the Fourteenth Amendment to judicial decisions is illustrated by the *Nebraska* case of *City of Hastings* v. *Foxworthy*, 45 N. 676, 63 N. W. 955. This case was before the court on appeal for the fourth time. On the first appeal, the court held that the statute involved was invalid (23 N. 772, 37 N. W. 657). Between that decision

and the fourth appearance of the case in the Supreme Court, the court decided the case of *City of Lincoln* v. *Grant*, 38 N. 369, 56 N. W. 995, in which an identical provision of another statute was held valid. The question thus arose as to whether the court should follow its first decision in the *Foxworthy* case under the law of the case rule, even though it had in effect overruled it in the *Grant* case, or whether it should apply the existing law of the state as announced in the *Grant* case.

The court, in referring to the *Grant* case, held that if the rule announced in the *Grant* case was to be followed, the question of the validity of a statute must be resolved in favor of the contention of the City of Hastings in the *Foxworthy* case, unless the decision of the court in the first Foxworthy appeal, which was contrary to the later decision in the *Grant* case, is binding upon the court, notwithstanding the court's deliberate judgment to the contrary in the later *Grant* case. The court, on page 698 of 45 Neb., said:

> "The court in the Grant case decided in effect that its former decisions in this case should have been in favor of the city instead of Foxworthy. In subsequent cases, by reason of the decision in the Grant case, the city would prevail under the same state of facts; but if the former decisions in this case are conclusive upon the court, the rule will be different for the city of Hastings and for Mr. Foxworthy in this one case than it is for all others and in other cases; and if so, what is to be done with that part of the Fourteenth Amendment to the Federal Constitution which forbids any state to deny to any person the equal protection of the laws? A court has no legislative power. Its duty is to declare what the law is, not to make law. To hold that it is bound to follow in a given case an erroneous decision formerly rendered in the same case would be to hold that, although the court believes the law to be otherwise, it will make a special law for the particular parties and the particular case before it, contrary to the

> general law—to substitute what it is pleased to call 'the law of the case' for the law of the land, for the law which every member of the court is sworn to administer. To do so it must not only legislate, but legislate specially in a manner which our constitution forbids to the legislative body itself."

(2). The Facts.

There is no dispute as to the facts stated in the petition herein; nor are there any other facts shown by the record which would have any tendency to change or modify the legal effect of said facts.

It appears, however, that the opinion of the Nebraska Supreme Court on the appeal from the confirmation of the sale contains some statements, which, if supported by the evidence or the record, might afford some basis for an argument that the Federal question sought to be reviewed in this proceeding had been decided in the opinion on the appeal from the decree of foreclosure (142 N. 698, R. 51 to 57, inc.) and that in order to review said question, petitioners should have applied to this court for a review of the decision on that appeal instead of a review of the decision of the second appeal. Assignments of Error 1 and 2 challenge the accuracy of those statements. The elimination of those statements on the ground that they have no support whatever in the record will eliminate the possibility of such an argument.

In the opinion on the appeal from the decree of confirmation, the following statement appears:

> "They (the petitioners) argue that section 77-2045, Comp. St. 1929, provides in part that 'No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land', and rely upon Taylor v. Evans, 106 Neb. 233, 183 N. W. 89, and City of Scottsbluff v. Acton, 135 Neb. 636, 8 S. C. J. 251, 283 N. W. 374.

> "This contention was advanced to this court when we determined, adverse to the defendants, the fact questions presented and the applicable law, and affirmed the decree of the trial court." (R. 49.)

A reference to the opinion on the appeal from the decree of foreclosure (142 N. 698) will show that no such question was presented or decided on that appeal. Section 77-2045, Comp. St. 1929, was neither mentioned or referred to in that opinion. No question as to the validity of a sale of one parcel of land for taxes due upon any other parcel of land was presented or determined in that case. Since no sale was made when that appeal was taken, it follows that no such question could have been presented or determined.

The opinion on appeal from the decree confirming the sale also contains the following statement:

> "Quite obviously the statute does not prohibit the district court from ordering the sale of a tract of land where it has been determined that there was but one tax lien upon the one tract ordered sold." (R. 50.)

While the foregoing does not state that it had been determined on the former appeal that there was but one tax lien upon the one tract of land ordered sold, that is the only inference that can be drawn therefrom. Again we repeat that an examination of the opinion on that appeal will disclose that no such question was presented or determined on that appeal. On the contrary, the following quotations from the opinion in 142 N. 698, R. 52, conclusively show that on the first appeal the Nebraska Supreme Court recognized that for the years mentioned the land was assessed in two separate tracts of equal acreage and unequal values:

> "The question presented arises because the officials, for some years, carried the ownership of the land below the canal under two names, equal acreage, and unequal values, when in fact the land was owned entirely by

one party, and the entire acreage so owned was liable to assessment and taxation as one unit under the name of one owner.

"The value of each tract was different for each year and different as to each tract each year.

"If the two assessed values are added together the total assessed valuation is had and if the two tax items are added together that total tax is determined.

"Are these taxes void because of the fact that this addition was not actually done on the assessment records and tax lists, or was not done before those lists were made up and because of the fact that the totals were not used?"

Since the land had been carried on the assessment books under two names, equal acreage and unequal values (R. 32 to 36, inc.), there must have been a separate tax lien for a different amount on each of the two separate tracts appearing under each of said names. There is, therefore, no foundation in the evidence or the record for the statement or the inference that it had been determined on the first appeal that there was but one tax lien upon one tract of land ordered sold.

(3). Erroneous Statements or Inferences in Opinion Will Not Defeat Federal Jurisdiction.

In Subdivision (f) (2) of this brief, petitioners called attention to certain statements and inferences of fact in the opinion of the Nebraska Supreme Court in this case which have no support whatever in the evidence or the record. As is shown, the conclusion of the Nebraska Supreme Court is based, not upon a direct statement of a fact, but upon the erroneous inference in the opinion that it had been determined on the appeal from the decree of foreclosure that there was but one tax lien upon the one tract of petitioners'

land which was ordered sold. If this statement or inference is true, or supported by any substantial evidence, it would, of course, defeat the jurisdiction of this Court; but since it is challenged, this Court will review the record to ascertain whether or not said statement has any support whatsoever in the evidence, and if it finds that said statement or inference has no support in the evidence, but is contrary to the evidence, it will not permit said statement or inference to defeat its jurisdiction.

United Gas Public Service Co. v. *Texas,* 303 U. S. 123. 143, 82 L. ed. 702, 716,
Milk Wagon Drivers Union v. *Meadowmoor Dairies.* 312 U. S. 287, 293, 85 L. ed. 836, 841.

(4). A Sale under Decree Entered without Jurisdiction Not Due Process.

Under the holding of the Nebraska Supreme Court in *Taylor* v. *Evans,* 106 N. 233, and *City of Scotts Bluff* v. *Acton,* 135 N. 636, the sale en masse of two tracts of land owned by the same person to satisfy the combined amount of the separate tax liens against them is prohibited by Sec. 77-2045, C. S. 1929, and therefore, the court had no jurisdiction to enter a decree directing such sale. Since the evidence and the record is undisputed that petitioners' land had been assessed in two separate tracts of equal acreage, but of unequal values, it follows that the tax lien on each of said tracts was different in amount from that on the other tract, and that the court had no jurisdiction to enter said decree.

It is well settled by the decisions of this Court that no judgment of a court is due process of law if rendered without jurisdiction.

In *Scott* v. *McNeal*, 154 U. S. 34, 46, 38 L. ed. 896, 901, this Court said:

> "No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice to the party."

In *Old Wayne Mut. L. Asso.* v. *McDonough*, 204 U. S. 8, 15, 51 L. ed. 345, 348, the Court, after having quoted the above, said:

> "No State can, by any tribunal or representative, render nugatory a provision of the supreme law. And if the conclusiveness of a judgment or decree in a court of one State is questioned in a court of another government, Federal or State, it is open, under proper averments, to inquire whether the court rendering the decree or judgment had jurisdiction to render it."

See also *Chambers* v. *Florida*, 309 U. S. 227, 228, 84 L. ed. 716, 718.

Therefore, if as the Nebraska Supreme Court held in *Taylor* v. *Evans* and *City of Scotts Bluff* v. *Acton*, neither of which have been overruled, it had not jurisdiction to enter a decree such as was entered herein, the decision of said court confirming the sale of petitioners' land under said decree deprived them of their property without due process of law.

(5). The Decree of Foreclosure Was Not Vitalized by Its Affirmance by the Nebraska Supreme Court.

As shown in Subdivision III (5) of the petition, under the decisions of the Nebraska Supreme Court in the cases of *Taylor* v. *Evans* and *City of Scotts Bluff* v. *Acton*, the District Court of Scotts Bluff County, Nebraska, had no jurisdiction to enter the decree of foreclosure directing the sale of the two separate tracts en masse for the satisfaction of a tax lien against each tract in an amount different

from that against the other. In the case at bar, the Nebraska Supreme Court adheres to the holding in those cases. Under the holding in those cases, the decree of foreclosure was absolutely void and subject to collateral attack.

In the opinion on the second appeal, the court said:

> "In the instant case, the tax sale certificate was held valid by the trial court, and its decision affirmed, after a full review, by this court and that determination has become final."

Since it must be conceded that under the decisions in the above mentioned cases the decree of the District Court was void for want of jurisdiction, its affirmance by the Supreme Court could not breathe into it the breath of life.

Article V, Section 2, of the Nebraska Constitution provides:

> "The Supreme Court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law."

The Supreme Court did not have original jurisdiction of this case. Its jurisdiction was appellate only. It is well settled in Nebraska and elsewhere that an appeal can not confer upon the reviewing court jurisdiction that the court from which the appeal was taken did not possess. In other words, where the jurisdiction of an appellate court is derivative only, jurisdiction can not be conferred upon it by consent of the parties.

Stenberg v. *State*, 48 Neb. 299, 67 N. W. 190.

Redell v. *City of Omaha*, 80 Neb. 178, 180, 113 N. W. 1054.

Stone v. *Blanchard*, 87 Neb. 1, 126 N. W. 766.

Northwestern State Bank v. *Hanks*, 118 Neb. 442, 444, 225 N. W. 119.

Re Estate of Mattingly, 121 Neb. 90, 91, 236 N. W. 175.
3 Am. Jr. 678.
3 C. J. 369.
Ball v. *Tolman*, 135 Cal. 375, 67 P. 339.
Pioneer Land Co. v. *Maddux*, 109 Cal. 633, 42 P. 295.
State, ex rel., Aquamsi Land Co. v. *Hostetter*, 79 S. W. (2d) 463, 336 Mo. 391.
Crawford v. *Pierce*, 185 P. 315, 56 Mont. 371.

In *Stenberg* v. *State*, 48 N. 299, 306, it was contended that a judgment entered in the district court of Douglas County on appeal from an order of the Board of County Commissioners was void because said board had no jurisdiction to pass upon the claim and, therefore, the district court acquired no jurisdiction on appeal. In response to this contention, the court, on pages 306 and 307, said:

> "Is the judgment void for want of jurisdiction of the subject-matter? There is no room for doubt that the district court, by the appeal, acquired no greater power or authority to hear and determine the matter than was possessed by the county board. True, the county appeared in the appellate court and contested the claim, but that is wholly immaterial. Jurisdiction of the person may be waived, but consent cannot confer jurisdiction of the subject-matter. If the county board had no power or authority to act in the premises, it is very evident the district court obtained none, and so say the authorities."

In *Redell* v. *City of Omaha*, 80 N. 178, the mayor and council of the city of Omaha rejected plaintiff's claim because prohibited from passing upon it by a provision in the city charter. In holding that plaintiff's appeal to the district court was properly dismissed for want of jurisdiction, the court, on page 180, said:

> "The limitation is of the power and jurisdiction of the auditing body itself, whose disobedience thereto would be a void act. It is axiomatic that a court in

> which an appeal may be prosecuted must derive its jurisdiction from the tribunal from which the appeal is taken."

The case of *Stone* v. *Blanchard*, 87 N. 1, was appealed from justice court to the district court and *Northwestern State Bank* v. *Hanks*, 118 N. 442, was appealed from the county court to the district court. Each was an action of forcible entry and detainer. The forcible entry and detainer statute conferred original jurisdiction upon justice and county courts but did not confer jurisdiction upon the district court. The statute also provided that justices shall not have jurisdiction "in actions in which title to real estate is sought to be recovered, or may be drawn in question and dismissed the appeal. The ground of the holding is shown by the first paragraph of the syllabus in 87 N. 1, which is as follows:

> "A justice of the peace has no jurisdiction to try actions of forcible entry and detainer in which the title to real estate is sought to be recovered, or may be drawn in question, and in such case the district court on appeal has no jurisdiction to try such issue, and should dismiss the action for that reason."

To the same effect is the third paragraph of the syllabus in *Northwestern State Bank* v. *Hanks*, 118 N. 442.

While none of the Nebraska cases involved an appeal to the Supreme Court from a judgment entered in the district court, which said court had no jurisdiction to enter, the authorities from other jurisdictions show that the rule applied in the above mentioned Nebraska cases also applies in appeals to courts of last resort.

In *State, ex rel. Aquamsi Land Co.* v. *Hostetter*, 79 S. W. (2d) 463, 336 Mo. 391, it was held that a judgment of affirmance is void where the judgment appealed from is void.

In *Crawford* v. *Pierce*, 56 Mont. 371, 185 Pac. 315, it is held that where it appears on the face of the record that the trial court was without jurisdiction, the judgment cannot be enforced and all proceedings founded upon it are invalid and ineffective for any purpose, and the judgment is open to collateral attack, and in such a case, affirmance of the judgment on appeal cannot make it valid.

From the foregoing, the following conclusions are deducible:

1. For the years 1919 to 1929, inclusive, petitioners land was assessed for taxation in two separate tracts of equal acreage and unequal values (R. 32-36, inc.), and the taxes assessed against each tract was different in amount from the taxes assessed against the other (R. 37-44, inc.), and any statement or inference to the contrary in the opinion on the appeal from the decree confirming the sale is not only unsupported by any evidence, but is contrary to all the evidence in the case.

2. Since said land was so assessed in two separate tracts and the tax lien on each tract was different in amount from the tax lien on the other tract, the decree of foreclosure of the district court directing the sale of both of said tracts en masse for the satisfaction of the aggregate amount of the taxes on each of said tracts was void for want of jurisdiction and subject to collateral attack.

3. Since the district court had no jurisdiction to enter said decree of foreclosure directing the sale of both of said tracts en masse, the Supreme Court acquired no jurisdiction on appeal therefrom and the affirmance of said decree by the Supreme Court on appeal did not and could not make it valid.

(6). Federal Question Stated.

This brings us to a consideration of the Federal question in the case, which may be stated as follows:

1. If the decree of foreclosure directing the sale of both tracts of petitioners land en masse for the aggregate amount of the taxes on each tract was void because Sec. 77-2045, C. S. 1929, deprived the court of jurisdiction to enter such decree, the sale of petitioners property under it had no greater legal force or effect than if said sale was made by the sheriff or an individual without authorization by any judicial proceedings or legal process of any kind. Therefore, the decision of the Nebraska Supreme Court affirming the decree of confirmation of said sale and holding it valid deprived petitioners of their property without due process of law, contrary to the due process clause of the Fourteenth Amendment of the Federal Constitution.

2. If it can be held that under the Constitution and laws of the state of Nebraska, the courts of said state, after having established the rule that Sec. 77-2045, C. S. 1929, deprived the courts of jurisdiction to order or, by confirmation, to approve a sale en masse of two or more tracts of land owned by the same person to satisfy the combined or aggregate amount of the several liens against said tracts, the court had jurisdiction in this case to enter a decree directing the sale of the two tracts of land owned by petitioners en masse for the satisfaction of the aggregate amount of the taxes levied against each tract, said decree deprived petitioners of the protection extended to all others by Section 77-2045, C. S. 1929, and thereby deprived petitioners of the equal protection of the laws, contrary to the equal protection clause of the Fourteenth Amendment of the Federal Constitution.

(7). The Decision of the Nebraska Supreme Court Deprives Petitioners of the Equal Protection of the Law.

Section 77-2045, C. S. 1929, provides:

> "No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land, nor shall any surplus proceeds of sale of one lot or parcel of land be applied to the payment of taxes or charges against any other lot or parcel of land."

This statute was construed in *City of Scottsbluff* v. *Acton*, 135 N. 636, 283 N. W. 374, and *Taylor* v. *Evans*, 106 N. 233, 183 N. W. 89.

In the *Acton* case the defendant Acton was the owner of tax lot 12, containing approximately 17 acres, which was a triangular piece of land abutting on the Burlington right of way. The city plaintiff laid a sewer along the south side of this tract and levied a special assessment against the south 150 feet of the tract comprising about four acres, to pay the cost of the construction of the sewer. The county treasurer issued a tax sale of certificate covering the entire tax lot 12 which included that part of the tax lot against which no special assessment was levied. A foreclosure against the entire lot was commenced on this certificate covering both general taxes and special assessments. The defendant made no appearance and default judgment was entered from which no appeal was taken. The real estate was sold and on objections filed by the defendant, the sale was set aside and a new sale held after which objections were again filed to confirmation. The trial court found, among other things, that the validity of the certificate upon which the foreclosure was based had already been adjudicated. The Supreme Court stated the question on page 639 as follows:

> "In the case before us we are concerned with the question whether or not the *blanket tax sale certificate*,

issued by the county treasurer against tax lot 12, against a portion of which special assessments were levied by the city of Scottsbluff, is void, and, if void, *did the district court have jurisdiction to enter a decree ordering said entire tax lot 12 to be sold to satisfy special assessments levied against a part thereof?*''

The court said on page 640:

''The appellant cites section 77-2045, Comp. St. 1929, which in part reads: 'No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land', and Taylor v. Evans, 106 Neb. 233, 183 N. W. 89, in which one Evans commenced a suit to foreclose tax liens, setting up each of the tax certificates as a separate lien upon the particular tract covered thereby. The owner of the land was made a defendant; he made no appearance, and a default decree was entered by the court against the owner. He failed to pay the amount of the lien as adjudged by the court against the owner. The clerk of the court combined the two amounts due upon both liens and directed the sheriff to sell both tracts for the aggregate sum, instead of keeping the two liens and the two tracts separate and distinct.

''The owner of the land filed no objections to the sale, the sale was confirmed and deed ordered to the purchaser. Subsequently, the owner of the land commenced an action to cancel the deed and all proceedings leading up to it, and to be adjudged the right to redeem. Relief was granted him in the court below, and the sale was declared void. The decree was in conformity with the statute (Rev. St. 1913, sec. 6565, now Comp. St. 1929, sec. 77-2045). The violation by the sheriff of the terms of the decree undoubtedly would have entitled the owner to an order setting aside the sale, if he had filed timely objection before confirmation. The question was whether or not the action of the sheriff was a mere irregularity, which would be cured by confirmation, or was a mode of sale adopted by the sheriff, in which the court was without jurisdiction either to

order in the first instance, or afterwards, by confirmation, to ratify and approve. In the body of the opinion, we find this language (p. 235): 'If it was clearly beyond the limits of the court's jurisdiction, a sale of the two tracts for the combined amount of the liens would be void, and, therefore, subject to collateral attack. The court could not, by confirmation, make valid a procedure which it could not in the first instance have ordered.'' And at page 237, the opinion stated: 'We can see no distinction between a case wherein two or more separate tax liens upon distinct tracts are involved and a case in which two or more separate mortgages upon distinct tracts owned by the same person are sought to be foreclosed. In the latter case it has been held that a sale of the tracts together for a gross sum is unauthorized and void, and will be set aside in a collateral suit. Hull v. King, 38 Minn. 349. * * * The district court was, in our opinion, without jurisdiction to order or by confirmation to approve a sale so conducted; it was void and therefore open to collateral attack.'

''The case of Taylor v. Evans, supra, is authority for the proposition that, where a sale is void and conducted in violation of the decree of the court, such sale is subject to collateral attack by an independent action, or at any time by proper objections to confirmation. Where the tax sale certificate disclosed special assessments against a part of real estate not subject thereto, the defendant, under the decision in Taylor v. Evans, supra, could, by collateral attack, raise the issue at any time during the proceedings.

''In 61 C. J. 1127, it is stated: 'The decisions generally recognize the following fundamental rules: (1) That a tax sale is invalid for every purpose unless the property was at the time liable for all taxes for which it was sold. (2) That in the absence of a statute to the contrary each parcel of a person's land separately assessed is liable to sale only for its own specific tax. (3) That where land is sold to pay the taxes due upon it, together with the taxes due upon other lands,

whether such lands belong to the same or a different owner, the sale is invalid.'

"For the reasons herein given, the judgment of the district court is reversed and the cause dismissed."

A comparison of the facts in the two above cases with the facts in this case shows that said cases can not be distinguished on the facts from the case at bar, there being no essential difference in the facts. For example, in both the *Acton* case and this case, all of the land involved was owned by the same individual, and in both cases all of the land so owned constituted one tract prior to the making of the assessments. In both cases a subdivision of the tracts into two parcels was made by the assessor for the purposes of taxation. In the *Acton* case there was a separate assessment against a certain designated portion of the whole tract; in the *Frank* case there were two separate assessments made against two separate designated portions of the whole tract. In the *Acton* case, the two parcels, which comprised the entire holding of Acton in the original tract, were sold as one tract to satisfy the taxes assessed against one of the two parcels, to-wit: the south 150 feet thereof. In the *Frank* case, the entire holdings of Frank in the original tract were sold as one tract to satisfy two separate tax items, each of which was assessed against a particularly designated part of the original tract.

In both cases the combined tax items were included in one tax sale certificate (R. 31). The combining of the taxes assessed against the tract carried on the assessment roll under the name DeMott, L. S., with those taxes assessed against the differently valued tract carried on the assessment roll for the years in question under the name of Frank constituted a selling of the first tract for its own taxes and for those assessed against the second tract, and it constituted a selling of the second tract for its own taxes and

for the taxes assessed against the other (R. 32 to 36, inclusive). The decision of the Nebraska Supreme Court in the case at bar did not overrule either of the above cases. On the contrary, it expressly approved the holding in those cases.

Although the facts in the case at bar are identical with the facts in the *Acton* case, the decision is diametrically opposite to the decision in that and the case of *Taylor* v. *Evans*. If the legislature had added to the foregoing section a provision that it should not apply to a certain named individual or to a certain described tract of land or to land in a designated city or town or to land in a certain part of a certain city or town, there would be no doubt that it would contravene the equal protection clause of the Fourteenth Amendment of the Federal Constitution because it would deprive the excepted party or the owners of the excepted land of the protection guaranteed by the statute to all others. The decision of the Nebraska courts in this case produces the identical result.

Yick Wo v. *Hopkins*, 118 U. S. 356, 30 L. ed. 220, 225, 227.

Connolly v. *Union Sewer Pipe Co.*, 184 U. S. 540, 556, 564, 46 L. ed. 679, 691,

Southern R. Co. v. *Greene*, 216 U. S. 400, 412, 54 L. ed. 536, 539.

In principle, the case of *Yick Wo* v. *Hopkins* is similar to the case at bar. In that case, an ordinance of the city and county of San Francisco conferred upon the Board of Supervisors a naked and arbitrary power to give or withhold consent to operate laundries in frame buildings. As to the nature and effect of the ordinances involved in that case, the court said:

> "They seem intended to confer, and actually do confer, not a discretion to be exercised upon a considera-

tion of the circumstances of each case, but a naked and arbitrary power to give or withhold consent, not only as to places, but as to persons. So that, if an applicant for such consent, being in every way a competent and qualified person, and having complied with every reasonable condition demanded by any public interest, should, failing to obtain the requisite consent of the supervisors to the prosecution of his business, apply for redress by the judicial process of mandamus to be a sufficient answer for them to say that the law had conferred upon them authority to withhold their assent, without reason and without responsibility. The power given to them is not confided to their discretion in the legal sense of that term, but is granted to their mere will. It is purely arbitrary, and acknowledges neither guidance nor restraint."

The Board of Supervisors administered the ordinances so as to prevent the operation of laundries by Chinese and permit their operation by the white race under identically the same circumstances. In holding that the ordinances denied the equal protection of the laws to Chinese, the court said:

"This conclusion, and the reasoning on which it is based, are deductions from the fact of the ordinance, as to its necessary tendency and ultimate actual operation. In the present cases, we are not obliged to reason from the probable to the actual and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind

so unequal and oppressive as to amount to a pratical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the board and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

The foregoing language is applicable to the case at bar. Although a statute in terms protects all property owners against the sale of one tract of land for taxes due upon another tract, the court, in this case, has refused to give petitioners the protection therein accorded to all others. Of course, the court is no more immune from the inhibitions of the Fourteenth Amendment than the Board of Supervisors were in the *Yick Wo* case.

In the *Connolly* case, the Ninth Section of the Illinois Anti-Trust Act provided that said act should "not be applied to agricultural products or livestock while in the hands of the producer or raiser". Because of this exemption, the court held that said law contravened the equal protection clause of the Fourteenth Amendment of the Constitution. In that case, the court, in 184 U. S. 559, quoted the following from *Missouri* v. *Lewis*, 101 U.S. 22, 31:

> " 'The 14th Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like

circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' "

The Nebraska Supreme Court has no power to legislate. For this reason, the question of a reasonable classification under the statute is not involved, but even so, it may not be out of place to quote the following from page 560 of said decision:

"The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * * It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the

14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground,—some difference which bears a just and proper relation to the attempted classification,—and is not a mere arbitrary selection' ".

In *Southern R. Co.* v. *Greene,* a statute of the state of Alabama imposing a tax upon foreign corporations owning railroad property in the state, but exempting domestic corporations from the payment of such tax, was held to contravene the equal protection clause of the Fourteenth Amendment to the Constitution. In that case, the court, in 216 U. S. 412, said:

"One of the provisions of the 14th Amendment, thus binding upon every state of the Federal Union, prevents any state from denying to any person or persons within its jurisdiction the equal protection of the laws. If this statute, as it is interpreted and sought to be enforced in the state of Alabama, deprives the plaintiff of the equal protection of the laws, it cannot stand.

"The equal protection of the laws means subjection to equal laws, applying alike to all in the same situation."

In answer to the argument that the statute could be upheld on the theory that the state had the right to make the classification therein referred to, the court, on page 417, said:

"It remains to consider the argument made on behalf of the state of Alabama, that the statute is justified as an exercise of the right of classification of the subjects of taxation, which has been held to be entirely consistent with the equal protection of the laws guaranteed by the 14th Amendment. It is argued that the imposition of special taxes upon foreign corporations for the privilege of doing business within the state is sufficient to justify such different taxation, because the tax im-

posed is different, in that the one imposed on the domestic corporation is for the privilege of being a corporation, whereas the one on the foreign corporation is for the privilege of such corporation to do business within the state. While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect to which such classification is imposed, and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification."

It therefore follows that if the legislature had enacted the statute involved in the case at bar, as construed by the Nebraska Supreme Court in this case, it would be in contravention of the equal protection clause of the Fourteenth Amendment of the Constitution. It will, of course, be conceded that the court is no more immune from the inhibitions of said Amendment than the legislature. Therefore, the decision of the Nebraska Supreme Court is in contravention of the due process clause to said Amendment to the Constitution and should be reversed.

(8). Federal Question Properly and Timely Presented.

Under the laws of Nebraska a judicial sale of real estate is not complete until confirmed by an order of court (Sec. 20-1531, Com. St. 1929). On the day of the sale and immediately after the adjournment thereof, petitioners filed their objections to the confirmation of said sale (R. 24-25). In said objections, petitioners asserted that said sale deprived them of their property without due process of law and denied them the equal protection of the laws. After a hearing the District Court, on May 24, 1943, overruled said objections, confirmed said sale and ordered a deed issued to the purchaser (R. 26, 27).

Under the rules of the Nebraska Supreme Court set out in the appendix hereto, no pleadings or assignments of error are provided for or permitted in the Supreme Court excepting the assignments of error which are set out in the appellants brief. By assignment of error Number 9 in said brief, the Federal question was presented to the Nebraska Supreme Court (R. 29). The rules of the Supreme Court also provided for the filing of a motion for re-hearing by the unsuccessful party (Appendix, Page 50). Petitioners filed a motion and brief for re-hearing again, by assignment of error No. IV, raising said constitutional question (R. 58). Said motion was overruled without opinion and petitioners claim under the Fourteenth Amendment to the Constitution of the United States was again rejected.

(9). The Judgment of the Supreme Court of Nebraska Can Not Be Sustained on Any Non-Federal Ground.

Where, in a case involving both Federal and non-Federal questions, a non-Federal ground of decision has fair support, this court will not inquire whether the decision of the state court is right or wrong.

Enterprise Irrigation District v. *Farmers Mutual Canal Co.*, 243 U. S. 157, 61 L. Ed. 644, 37 S. Ct. 318.

However, if the non-Federal ground is without substantial support, constitutional issues will not be permitted to be evaded.

Ward v. *Love Co.*, 253 U. S. 17, 64 L. ed. 751, 40 S. Ct. 419;

Leathe v. *Thomas*, 207 U. S. 93, 52 L. ed. 118, 28 S. Ct. 30.

The United States Supreme Court will review findings of fact by a state court where a Federal right has been

denied as the result of a finding shown by the record to be without evidence to support it, or where such finding is contrary to the record, and where a conclusion of law as to a Federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts.

United Gas Public Service Co. v. *Texas*, 303 U. S. 123, 82 L. ed. 702, 703.

If there is any non-Federal ground on which the decision of the Nebraska Supreme Court may be said to be based, which we question, it is the inferential finding of the court that for the years 1919 to 1929 the land owned by the petitioners was assessed as one tract rather than as two tracts and that, therefore, there was but one tax lien for each of said years, which lien covered the combined acreage owned by the petitioners. This finding of fact is so intermingled with the court's conclusion that there is no merit in the petitioners' contention that they have been denied the equal protection of the law, as to make it necessary for this Honorable Court to analyze the facts and determine the nature of the assessments.

(10). The Federal Question Here Involved Is Substantial.

The United States Supreme Court should accept jurisdiction of this case because there is a substantial Federal question involved which was timely presented. The question here involved is one that has never been clearly determined by this court and the Nebraska Supreme Court has decided it in a way probably not in accord with applicable decisions of the United States Supreme Court (Rule 38, (5)a, Supreme Court Rules). Analysis and exposition are necessary to make clear the decisive effect of such prior decisions of this court as might tend to throw any light on the question here involved, and therefore, any previous

decisions of this court, even if applicable, do not foreclose a review of this case in this court (36 C. J. S. 150, § 243).

The previous decisions to which we make reference are those holding that the inhibitions of the Fourteenth Amendment are binding on the state courts as well as on the other departments of the state; for example, *Scott* v. *McNeal*, 154 U. S. 34, 45, 38 L. ed. 896, 901; *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 234, 41 L. ed. 979, 984; *Taylor* v. *Beckham*, 178 U. S. 548, 599, 44 L. ed. 1187, 1208, 1209, and the decisions holding that the Fourteenth Amendment does not guarantee uniformity of judicial decision, such as *Milwaukee Electric R. & Light Co.* v. *Wisconsin*, 252 U. S. 100, 64 L. ed. 476, 40 S. Ct. 306, 10 A. L. R. 892. Analysis and exposition of the decisions are necessary to determine which rule should be applied to this case. As is more fully pointed out in subdivision (11) of part (f) of this brief, the decisions of the type last referred to are all cases in which, where a former precedent has not been followed, it has been overruled. But in this case, the precedents petitioners invoked and relied on were not overruled but were adhered to but not applied to the undisputed facts in this case.

(11). Uniformity of Decision Rule.

Petitioners have not overlooked the rule that the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions nor immunity from judicial error. It therefore becomes necessary to ascertain the meaning and limits of that rule.

As shown in Subdivision (f) (6) of this brief, a state court cannot, by making a finding of fact which has no support whatever in the evidence or the record, deprive a person of his property, contrary to the due process clause of the Fourteenth Amendment. So far as petitioners have been able to determine, that rule has not been applied by

this court to the equal protection clause of said Amendment. However, the rule must apply to said clause, for if it doesn't, state courts could, in all cases, by the simple device of making a finding which is not supported by the record, evade that clause of said Amendment. The refusal of this court to apply said rule to the equal protection clause of said Amendment would make state courts immune to the inhibitions of said clause.

Therefore, there must be, and is, a clear distinction between the case at bar and the cases in which this court has held that the due process clause of said Amendment does not assure uniformity of judicial decision. As shown in Subdivision (f) (2) of this brief, petitioners real estate was assessed in two separate tracts of equal acreage and unequal values. Such was the finding of the Nebraska Supreme Court on the appeal from the decree of foreclosure. Had the Nebraska Supreme Court, in its decision upholding the sale of petitioners property, adhered to its findings in its decision affirming the decree of foreclosure and overruled the cases of *Taylor* v. *Evans* and *City of Scottsbluff* v. *Acton*, thereby making the decision in the case at bar applicable to all persons alike, this case would fall within the decisions of this court holding that the equal protection clause of the Fourteenth Amendment does not assure uniformity of judicial decision.

In *Central Land Co.* v. *Laidley*, 159 U. S. 103, 40 L. ed. 91, it was contended that because the Supreme Court of West Virginia placed upon a statute a construction different from the construction that had been previously placed thereon by the courts of Virginia, and later by the courts of West Virginia, the plaintiff, in error, had been deprived of the equal protection clause of the Fourteenth Amendment. Apparently, the decision in that case overruled the previous decisions of the Supreme Court of West Virginia. This is apparent from the last paragraph of the opinion

of this court. Therefore, the decision of the West Virginia court, in that case, became the law of the state, applicable alike to the litigants in that case and all others similarly situated.

Although not specifically mentioned, this distinction applies to all of the decisions of this court which hold that the Fourteenth Amendment does not guarantee uniformity of decisions or against erroneous decisions of state courts.

In *Backus Sons* v. *Fort Street Union Depot Company*, 169 U. S. 557, 570, 42 L. ed. 853, 859, it was held that when the state courts, having construed a state statute as prescribing one form of procedure, their subsequent adjudication that such construction is wrong, and that the statute really provides a different mode of procedure, cannot be set aside in the Federal courts as an unjust discrimination or a denial of the equal protection of the laws. Prior to the decision of the state court in that case, a condemnation statute had been construed to the effect that a jury called thereunder was a jury of inquest and not a trial jury, whereas in that case, the ruling was to the contrary. In holding that this change in the construction of the statute did not deprive the respondents of the equal protection of the laws, this court called attention to the fact that the change was of the remedy and not in any substantial right, and said:

> "There is no vested right in the mode of procedure. Each succeeding legislature may establish a different one, providing only that in each is preserved the essential elements of protection."

In 169 U. S. 571, the court said:

> "The question is not presented of a distinct ruling by a state court that one party is entitled to certain rights and the benefits of certain modes of procedure, and that another party similarly situated is not en-

titled to them. An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws. But that does not prevent a legislature, which has established a certain rule of procedure, and continued it in force for years, from subsequently repealing the act and establishing an entirely different mode of procedure. In other words, there is no absolute right vested in the individual as against the power of the legislature to change modes of procedure. And a similar thought controls where the courts of the state have construed a statute as prescribing one form of procedure, and parties have acted under that construction, and then subsequently the same court has held that the statute was theretofore misconstrued, and really provided a different mode of procedure. This last adjudication cannot be set aside in the Federal courts on the ground of an unjust discrimination or a denial of the equal protection of the laws."

In *Milwaukee Electric Railway and Light Co.* v. *Wisconsin*, 252 U. S. 100, 105, 106, 64 L. ed. 476, 480, the company contended that subsequent to the entry of the judgment in that case by the state court, said court, in a similar case, rendered another decision which was irreconcilable with the decision in that case and that, therefore, the decision in that case contravened the equal protection clause of the Constitution. However, this court held that the company could base no right under said clause of the Constitution upon a later decision between strangers. Apparently the later decision overruled the decision before the court in that case and thereafter constituted the law of the state of Wisconsin, applicable alike to all parties.

In *Tidal Oil Co.* v. *Flannigan*, 263 U. S. 444, 451, 68 L. ed. 382, 385, it was contended that a change in the rule of law by the highest court of the state was repugnant to that

provision of the Federal Constitution prohibiting the passage of any law impairing the obligation of contracts, as well as to the equal protection clause of the Fourteenth Amendment. This court held that the contract clause was directed only against legislation and not against judicial decisions. The court further held that the Federal question was not seasonably raised in the state court.

In *Worcester Co. Trust Co.* v. *Riley*, 302 U. S. 922, 299, 82 L. ed. 268, 275, which went up from the United States Circuit Court of Appeals, the complainant sought an injunction restraining the tax officials of the state of California from obtaining a judicial determination of the liability of a decedent's estate to pay taxes in that state, apparently on the ground that he feared that the courts of California would erroneously decide the case against him. The court affirmed the judgment, denying the injunction on the ground that the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error or that their pronouncements shall be consistent.

But a state court cannot, by overruling its prior decisions, deprive a person of this property without compensation and, therefore, without due process of law.

The case of *Muhlker* v. *N. Y. & H. R. Co.* 197 U. S. 544, 570, 49 L. ed. 872, 878, was an action to enjoin the use of an elevated railroad in front of plaintiff's premises until the value of certain easements of light and air should be paid. At the time plaintiff acquired his property, under the doctrine of the elevated railroad cases, plaintiff could not be deprived of the easements without compensation. By the decision in that case, the Court of Appeals of the state of New York reached a conclusion directly opposite to the doctrine of the elevated railroad cases and held that the plain-

tiff was not entitled to compensation for those easements. In reversing that decision, this court said:

> "When the plaintiff acquired his title those cases were the law of New York, and assured to him that his easements of light and air were secured by contract as expressed in those cases, and could not be taken from him without payment of compensation.
>
> "And this is the ground of our decision. We are not called upon to discuss the power, or the limitations upon the power, of the courts of New York to declare rules of property or change or modify their decisions, but only to decide that such power cannot be exercised to take away rights which have been acquired by contract and have come under the protection of the Constitution of the United States. And we determine for ourselves the existence and extent of such contract. This is a truism; and when there is a diversity of State decisions the first in time may constitute the obligation of the contract and the measure of rights under it. Hence the importance of the *Elevated Railroad* Cases and the doctrine they had pronounced when the plaintiff acquired his property. He bought under their assurance, and that these decisions might have been different, or that the plaintiff might have balanced the chances of the commercial advantage between the right to have the street remain open and the expectation that it would remain so, is too intangible to estimate."

Conclusion.

For the reasons above stated, your petitioners respectfully submit that a writ of certiorari should be issued out of and under the seal of this court, directed to the Supreme Court of the State of Nebraska, and that the decree of said court affirming the decree of the district court of Scotts Bluff County, Nebraska, should be reversed.

THOMAS M. MORROW,
PAUL T. MILLER,
Attorneys for Petitioners.

APPENDIX.

Sec. 77-2045, Compiled Statutes of Nebraska, 1929.

Same, Order of Sale, Costs. Upon the expiration of thirty days from and after such decree the plaintiff shall be entitled to an order of sale of the lands remaining unredeemed. No lot or parcel of land shall be sold for taxes due upon any other lot or parcel of land, nor shall any surplus proceeds of sale of one lot or parcel of land be applied to the payment of taxes or charges against any other lot or parcel of land: *Provided,* where the same defendant is the owner of two or more lots or parcels of land, the court may in its decree order that any surplus proceeds of sale of one lot or parcel of land shall be applied to the payment of taxes and costs against any other lot or parcel of land owned by the same defendant, where no rights of third persons will be affected thereby, and that only so much of the land so owned by one defendant shall be sold as may be necessary to satisfy all taxes and costs charged against all the lands owned by the same defendant. (1903 p. 477; Ann. 11136; Comp. 5159; R. S. 1913, 6565, C. S. 1922, 6093.)

Sec. 20-1531, Compiled Statutes of Nebraska, 1929.

Confirmation of Sale. If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provision of this title and that the said property was sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements; and the officer on making such sale may

retain the purchase money in his hands until the court shall have examined his proceedings as aforesaid, when he shall pay the same to the person entitled thereto, agreeable to the order of the court: *Provided*, the judge of any district court may confirm any such sale at any time after such officer has made his return, on motion and ten days' notice to the adverse party or his attorney of record, if made in vacation. When any sale is confirmed in vacation the judge confirming the same shall cause his order to be entered on the journal by the clerk. (Code P. 498, R. S. p. 478; 1875 p. 38; Ann. 1500; Comp. 7070; R. S. 1913, 8077; 1915 p. 319; C. S. 1922, 9013.)

Article V, Section 2, Constitution of Nebraska.

Supreme Court, Judges, Decisions, Jurisdiction, District Judges to Act as Associates, Divisions, Constitutionality of Statutes, District Judges Reimbursed for Expenses. The supreme court shall consist of seven judges, one of whom shall be the Chief Justice. A majority of the judges shall be necessary to constitute a quorum. A majority of the members sitting shall have authority to prounounce a decision except in cases involving the constitutionality of an act of the Legislature. No legislative act shall be held unconstitutional except by the concurrence of five judges. The supreme court shall have jurisdiction in all cases relating to the revenue, civil cases in which the state is a party, mandamus, quo warranto, habeas corpus, and such appellate jurisdiction as may be provided by law. Whenever necessary for the prompt submission and determination of causes, the supreme court may appoint judges of the district court to act as associate judges of the supreme court, sufficient in number, with the judges of the supreme court, to constitute two divisions of the court of five judges in each division. Whenever judges of the district court are so acting the court shall sit in two divisions, and four of the judges thereof shall be necessary to constitute a quorum. Judges of the district court so appointed shall serve during the

pleasure of the court, and shall have all the powers of judges of the supreme court. The Chief Justice shall make assignments of judges to the divisions of the court, and shall preside over the division of which he is a member and designate the presiding judge of the other division. The judges of the supreme court, sitting without division, shall hear and determine all cases involving the constitutionality of a statute, and all appeals from convictions of homicide; and may review any decision rendered by a division of the court. In such cases, in the event of the disability or disqualification by interest or otherwise of any of the judges of the supreme court, the court may appoint judges of the district court to sit temporarily as judges of the supreme court, sufficient to constitute a full court of seven judges. Judges of the district court shall receive no additional salary by virtue of their appointment and service as herein provided; but they shall be reimbursed their necessary traveling and hotel expenses. (Amended, 1890, 1896, 1908, 1920.)

Rules of the Nebraska Supreme Court.

The following are the applicable portions of the Revised Rules of the Supreme Court of the State of Nebraska in force at the time this litigation was pending:

10. Transcripts and Bills of Exceptions.

a. Transcript.—The transcript required by Section 20-1912 Compiled Statutes of 1929, as amended by L. B. No. 182 of the 1941 legislative session, shall contain the judgment, decree or final order sought to be reversed, vacated or modified, and a copy of the supersedeas bond, if any, given in the District Court, or if none be given, should contain a recital of the fact that a bond for costs was given and approved in the District Court or a deposit made as required by Rule 9a and by Section 20-1914 Compiled Statutes of 1929, as amended by L. B. 182 of the 1941 legislative session, and in addition thereto, such other parts of the record as may be designated by the party appealing. If any

objection is made to the giving or refusing to give any instructions, all instructions given by the court shall be copied in the transcript. If no such objection is made, all instructions may be omitted. The transcript shall be neatly and securely bound at the top and be paged at the bottom, and notes shall be placed on the left margin of each page of the transcript indicating the several pleadings in the case, the exhibits, if any, the rulings of the court, the verdict or special findings, if any, and an index referring to the initial page of each pleading, action and other paper or ruling in the record, and such index to form the first page of the transcript.

c. Bills of Exceptions.—The bills of exceptions shall be paged and shall have an index forming the first page thereof, referring to the initial page of the direct, cross and re-examination of each witness, and of each deposition or other paper or exhibit. Where the evidence is set out by deposition or otherwise, the name of each witness, and whether the examination is direct, cross or re-direct, shall be stated at the top or in the margin of each page. All depositions, exhibits or papers contained in the bill must, when practicable, be inserted immediately following the rulings of the court thereon, and the bill must be filed in the District Court. The questions in the bills of exceptions shall be numbered. Bills of exceptions may be filed at any time prior to the final submission of the case.

Briefs—How Prepared.

a. Appellant's Brief.—The brief of appellant shall consist of the statement of the case, the substance of such parts of the record relied upon, and the argument of counsel.

1. The statement of the case shall consist of:

   (a) The kind of action or nature of the case.
   (b) The issues actually tried in the court below.
   (c) How the issues were decided and what the judgment or decree of the trial court was.
   (d) The errors relied upon for reversal, separately numbered.

18. Motions for Rehearing.

a. All motions for rehearing in cases brought to this court by appeal or error proceedings must be printed and may be filed at any time within 20 days from the filing of the opinion or rendition of the judgment in the case. Such motion must specify distinctly the grounds upon which it is based and include the brief in support thereof, and which shall be prepared as nearly as possible in accordance with Rules 13 and 14. In all cases 15 copies must be filed with the clerk.

19. Mandates.

a. Civil Cases.—No mandate will issue in any civil case during the time allowed for the filing of a motion for rehearing, or pending the consideration thereof, unless specially ordered by the court or stipulated by the parties.

c. Where appeal is sought to be taken to United States Supreme Court.

Parties desiring to prosecute proceedings to the Supreme Court of the United States, either by appeal or certiorari may obtain an order staying the issuance of the mandate of this court by filing application therefor with the clerk. Such application shall be ex parte but must be filed within 20 days from the date of the filing of the opinion of this court. The court may require the giving of a bond as a condition for the granting of such stay.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 402

OWEN A. FRANK AND DOROTHEA FRANK,
Petitioners,

vs.

THE COUNTY OF SCOTTS BLUFF.

BRIEF OF RESPONDENT OPPOSING CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEBRASKA

FLOYD E. WRIGHT,
JACK L. RAYMOND,
Counsel for Respondent.

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Reference to Opinion of State Court

The opinion of the Supreme Court of Nebraska on the appeal from the decree of foreclosure is reported in 142 Neb. 698. The opinion on the appeal from the decree confirming the sale has not been officially reported but is found in 13 S. C. J. 216, 13 N. W. (2d) 900.

Statement of the Case

The principal objection to the jurisdiction of this court is the fact that no timely tender of the alleged federal questions set forth in the petition for writ of certiorari and brief in support thereof was ever made to any state court in any proceeding in which it was proper for the state courts, under the constitution and statutes of the state, to determine them.

Issues in the Trial Court

The petition alleged the levy and assessment of taxes for the years 1919 to 1936, both inclusive, upon the following described real estate situate in the County of Scotts Bluff, Nebraska, to wit:

> "All that part of the Northwest Quarter of Section 24, Township 22 North, Range 55 West of the Sixth Principal Meridian lying south of the Winter Creek Canal,

alleged the non-payment of these taxes, sale thereof by certificate to the County of Scotts Bluff, and all other requirements for the foreclosure of the lien evidenced by the tax sale certificate (R. 1-7).

The answer and cross petition (R. 7) admitted most of the material allegations of the petition, but alleged in substance, that the taxes evidenced by the certificate against the tract of land therein described had been levied against two separate pieces of land, the total of the two comprising the whole of the above described premises, that each piece was described as "Pt NW¼ Sec. 24, Twp. 22, Range 55" on a separate line in both the assessment Rolls and the Tax Lists, each line carrying a different valuation and the name of the owner being shown as "DeMott, L. S." on one line and "Frank, William" on the other. Paragraph 1 of the cross petition (R. 9) alleges, however, that one William Frank became the owner of all of the land described in the petition in 1916, and conveyed it to petitioner, Owen A. Frank, on February 23, 1925, since which time petitioner has been the owner thereof. The only issue now important which was expressly tendered by the answer and cross petition was that the description appearing upon the assessment rolls and tax lists for the years 1919 to 1929 inclusive was not sufficient to identify the property described in the petition or any part thereof, and that therefore the taxes alleged to

have been assessed against the property for said years are void and constitute no lien thereon (R. 7-12).

The trial court, after an examination of the pleadings and process in the case, after hearing *all of the evidence offered*, and after having considered the briefs of the parties (R. 13), and having taken the case under advisement for further study (R. 13-14), found generally for the respondent and against the petitioners in this court (R. 14). This finding is, of course, inclusive of a finding that the description set forth by the tax lists and assessment rolls was not so indefinite as to render it void; and was inclusive of a finding that the assessment had, in fact, been made against a single tract listed upon the tax records on two lines. No federal right, privilege or immunity, was alleged in the answer and cross petition filed in the trial court and no federal question was otherwise raised therein (R. 7-12). The trial court decided no Federal question (R. 13-19).

Issues in the Supreme Court of Nebraska on the First Appeal

The assignments of error presented on the first appeal to the Supreme Court of Nebraska are not found in the record. The reason why they do not appear in this record is obvious from the statement by the Supreme Court of Nebraska of their substance. The opinion of the Nebraska Supreme Court (R. 52) states:

> "The question presented here is whether or not the description on the assessment records and tax lists is sufficient to sustain the tax sale certificate and to identify the property against which plaintiff proceeds. The trial court held that it was. Defendants appeal. We affirm the judgment."

From the foregoing quotation from the opinion, which is the only evidence in the record on the question of what

issues were tendered and litigated on the first appeal, it is clear that no questions of a federal right, privilege or immunity or of any other federal nature were tendered to the Supreme Court of Nebraska upon the appeal from the decree of foreclosure. The Supreme Court of Nebraska held, under a specific statute, that listing the land in the name of one DeMott did not render the tax void or voidable or the assessment invalid. The Court says (R. 54):

> "Section 77-2034, Comp. St. 1929, provides: 'No sale of real property for taxes shall be void or voidable on account of the same having been assessed in any other name than that of the rightful owner.' • • • In the light of the statute the description of the property in the various assessment records and tax lists must be considered as though at all times the name Frank had been used where DeMott was used."

(R. 55) "Defendants argue that the land was not sufficiently described because there is no way that any one can segregate that part assessed following the name of Frank from that part assessed following the name DeMott; that there are no defined boundaries and no data by which either tract may be located.

"The fallace of defendants' argument lies in the *fact* that to sustain it they must rely on an ownership of part of this land by DeMott, and an inability to separate DeMott's interest from Frank's; where *in fact* DeMott had no interest in the land and *there were no different interests* to segregate, as there was at all times herein involved but one interest.

"This is a matter of simple arithmetic. If the two 'Pt. N. W. ¼'s are added together the total of the land below the canal owned by Frank is described. If 75.2 acres and 75.2 acres are added together the total of that acreage is shown. If the two assessed values are added together the total assessed valuation is had and if the two tax items are added together the total tax is determined.

"Are these taxes void because of the fact that this addition was not actually done on the assessment rec-

> ords and tax lists, or was not done before those lists were made up and because of the fact that the totals were not used? We do not think so." (Italics ours)

A charge is made in the petition for writ of certiorari and supporting brief against the intellectual honesty of the Nebraska Supreme Court in its findings of fact to the effect that there is involved in this action only a single assessment against a single identifiable tract of land for any of the years involved from 1919 to 1936. An example is found at p. 21 of petitioners' brief in support of their prayer for certiorari. However, none of the evidence considered by the trial court, and none of the evidence in the record before the Supreme Court of Nebraska, is brought to this court except the tax lists themselves and the assessment records. Counsel also overlook the court's discussion of both the local case law and statute law as applied to the distinguishing facts of this case.

Without entering into the proffered debate upon that question, it is sufficient here to point out that no question of violation of any Federal right, privilege or immunity was tendered to the Supreme Court of Nebraska on the first appeal, and none was considered by that court. No claim was made on the first appeal that the defendant had been deprived of due process of law by the decree of the trial court ordering the sale of the property as one tract, or that the decree denied him the equal protection of the laws.

The record fails to show that any motion or petition for rehearing was ever filed in the Supreme Court of Nebraska subsequent to its first opinion, as allowed by Rule 18(a) Revised Rules Supreme Court of Nebraska, set forth on p. 50 of the appendix to petitioner's brief, and while the Supreme Court of Nebraska had jurisdiction of the cause and the power to correct any errors it might have made in its decision. The record thus fails to show that any

Federal question relating to the validity of the decree of the trial court or the opinion and judgment of the Supreme Court was ever before that court while, in accordance with state practice, it was proper for that court to entertain and decide it.

The first place where any Federal question is even intimated by the record is in the objections to confirmation of the sale held pursuant to the decree of the District Court as finally affirmed by the Nebraska Supreme Court (R. 24-25). At this time, it was not proper under state practice, for the trial court to entertain such questions. (See decision of Nebraska Supreme Court in the instant case (R. 47), and the cases therein cited at R. 50-51.) The trial court overruled the objections to confirmation, and petitioners again appealed to the Supreme Court of Nebraska. Upon this appeal their assignments of error are exhibited by the record (R. 28-30).

The only basis of the decision of the Supreme Court of Nebraska on this second appeal, was that the issue of fact upon which the federal questions are attempted to be predicated, the issue of whether the taxes were, *in fact,* assessed and levied as upon one tract or two, had already been adversely and finally adjudicated against petitioner, and that, at that time, in that form of proceedings, under the state practice it was not proper for the court to entertain such questions.

This is summarized in the two syllabus points, as follows:

> "1. The only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree.
>
> "2. Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder."

In the body of the opinion (R. 49-50), the Supreme Court of Nebraska demonstrates, *per dicta*, the distinctions existing between the facts of the cases upon which defendant relied, and now relies, in alleging the invalidity of the original decree of foreclosure and its affirmance, and the facts found both by the trial court and the Supreme Court in the instant case, and the consequent difference in the application of the law. The court also stated that its analysis of the facts of these cases clearly illustrates that there is no merit in the contention that defendant was denied the equal protection of the laws. The foregoing was purely *dictum*, and by way of explanation of its previous holdings in this case and in the cases relied upon by defendant. The real decision of the court, as shown by the paragraphs immediately following and the decisions there cited, was that it was not proper, under state practice, in the proceeding before it, to reexamine its previous finding of fact or to entertain the question of whether there had been a denial of equal protection, or any other federal right.

Argument

Extended argument is unnecessary to demonstrate the lack of jurisdiction of this court. It is a familiar rule that:

> "The state laws and practice relative to the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, are no less applicable when Federal rights are in controversy than when the case turns entirely upon questions of local or general law."
> *John* v. *Paullin*, 231 U. S. 583, 58 L. Ed. 381, 34 Sup. Ct. Rep. 178.

In another case, this court has said:

> "To become the basis of a proceeding in error from this court to the Supreme Court of a state 'a right, privi-

lege, or immunity' claimed under a statute of the United States must be 'especially set up and claimed,' and must be denied by the state court. Rev. Stat. Sec. 709, Judicial Code, Sec. 237 (36 Stat. at L. 1156, chap. 231, Comp. Stat. 1913, Sec. 1214). This means that the claim must be asserted at the proper time and in the proper manner by pleading, motion, or other appropriate action under the state system of pleading and practice (Mutual L. Ins. Co. v. McGrew, 188 U. S. 291, 308, 47 L. ed. 480, 484, 63 L. R. A. 33, 23 Sup. Ct. Rep. 375), and upon the question whether or not such a claim has been so asserted the decision of the state court is binding upon this court, when it is clear, as it is in this case, that such decision is not rendered in a spirit of evasion for the purpose of defeating the claim of Federal right. Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 35 Sup. Ct. Rep. 865, Ann. Cas. 1916B, 252, 9 N. C. C. A. 265; John v. Paullin, 231 U. S. 148, 46 L. ed. 847, 22 Sup. Ct. Rep. 605; Layton v. Missouri, 187 U. S. 356, 47 L. ed. 214, 23 Sup. Ct. Rep. 137."

Atlantic C. L. R. Co. v. *Mims,* 242 U. S. 532-537, 61 L. ed. 476, 478.

The Supreme Court of Nebraska held in this case (R. 50-51):

"It has long been the rule that the only matters inquired into and adjudicated in the proceedings for confirmation of a judicial sale are those steps which the law requires shall be had and done for the satisfaction of the decree. Comp. St. 1929, sec. 20-1531; Schriber v. Platt, 19 Neb. 625, 28 N. W. 289; Best v. Zutavern, 53 Neb. 619, 74 N. W. 81; Wollmer v. Wood, 119 Neb. 248, 228 N. W. 541; Douglas County v. Barker Co., 125 Neb. 253, 249 N. W. 607; Holferty v. Wortman, 135 Neb. 732, 283 N. W. 855; Wallace v. Peterson, 136 Neb. 39, 284 N. W. 866.

"There is a further rule that is here applicable. Alleged errors of law in a decree and in the proceedings leading thereto are not reviewable upon objections to confirmation of a sale had thereunder. Cochran v.

Cochran, 1 Neb. (Unof.) 508, 95 N. W. 778; Beatrice Paper Co. v. Beloit Iron Works, 46 Neb. 900, 65 N. W. 1059; Hoover v. Hale, 56 Neb. 67, 76 N. W. 457; Cox v. Parrotte, 59 Neb. 701, 82 N. W. 7; Douglas County v. Barker Co., supra; Farmers Security Bank v. Wood, 132 Neb. 175, 271 N. W. 349.

"Defendants' attack here is not upon the proceedings had subsequent to the decree, but upon the decree itself, and upon the questions of fact and law that were determined in the decree. They are not reviewable upon objections to the confirmation of the sale."

The Nebraska Statute cited by the Supreme Court of Nebraska in the foregoing quotation from its opinion herein, Sec. 20-1531, Comp. St. Neb. 1929, so far as pertinent here is as follows:

"20-1531. Confirmation of Sale. If the court, upon the return of any writ of execution, or order of sale for the satisfaction of which any lands and tenements have been sold, shall, after having carefully examined the proceedings of the officer, be satisfied that the sale has in all respects been made in conformity to the provision of this title and that the said property sold for fair value, under the circumstances and conditions of the sale, or, that a subsequent sale would not realize a greater amount, the court shall direct the clerk to make an entry on the journal that the court is satisfied of the legality of such sale, and an order that the officer make to the purchaser a deed of such lands and tenements * * *."

The foregoing statute, as interpreted by the Supreme Court of Nebraska in the instant case, and in the cases cited therein (R. 50-51), clearly limits the scope of the inquiry by the trial court on the hearing of motions for and objections to confirmation of a judicial sale, to questions relating to the regularity of the proceedings of the officer conducting the sale, the value of the property sold, and the circumstances and conditions of the sale, as well as the possibilities of greater return from another sale.

If this court should entertain certiorari herein and assume jurisdiction of this cause, it would only be upon the assumption that it could and would grant petitioners relief if, upon full hearing of the merits of their petition, it should be determined that they were entitled to it. Assume, solely for the sake of argument, that petitioner had a valid complaint upon federal grounds against the tax levied, the decree rendered thereon, and the judgment of the Supreme Court of Nebraska affirming the same. Would this court, even then, be in a position to render him any relief? Would this court issue a mandate to the Supreme Court of Nebraska directing that court to violate a local procedural statute, against which statute no complaint of invalidity has been made? Would this court direct the Supreme Court of Nebraska to set aside its many decisions announcing a principle of practice uniformly adhered to throughout the history of the state, and grant relief to petitioners when it has uniformly refused relief to others in identical circumstances? Would this court direct the Supreme Court of Nebraska to reexamine its decision of questions of fact, which decision has become final under state practice, and over which the State Supreme Court has lost jurisdiction, no federal question having been raised in connection therewith while the cause was before the Supreme Court of Nebraska on its merits, and no review having been sought from this court during the statutory time following the decision of the Supreme Court of Nebraska on the merits?

This court has already adequately answered these questions in the quotations above made from *John* v. *Paullin, supra,* and *Atlantic C. L. R. Co.* v. *Mims, supra,* and the many cases cited in the quotations from those two. It is obvious that federal rights involved in proceedings before state courts must be asserted and protected in the manner prescribed by state practice.

If petitioners had any federal question, the same should have been asserted in their answer and cross petition filed when the case was before the trial court upon its merits. They might not have been too late if they had asserted those rights in their first appeal to the Supreme Court of Nebraska. Petitioners chose to submit the case then, entirely upon issues of fact and purely local questions of law. They still might not have been too late to have asserted the alleged federal rights, if they had availed themselves of the opportunity of calling them to the attention of the Supreme Court of Nebraska by motion for rehearing as provided by the rules of the latter court. They deliberately chose to pass all of these opportunities of tendering the questions which they now ask this court to adjudicate in review, until the State Supreme Court had lost jurisdiction of the merits of the cause by return of its mandate, and the trial court had no further inquiry to make under local practice than a determination of the regularity of the execution of a final judgment. The inference is forcible that petitioners' presentation of the petition for writ of certiorari is dilatory.

Conclusion

Respondent respectfully submits that the petitioners have failed to demonstrate that a writ of certiorari should issue, and that even a studious and careful deletion of the record is unavailing to show proper and timely presentation of any federal question to the state courts, and that the petition should therefore be denied.

Respectfully submitted,

FLOYD E. WRIGHT,
JACK L. RAYMOND,
Attorneys for Respondent.

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SUPREME COURT OF THE UNITED STATES

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No. 402

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vs.

COUNTY OF SCOTTS BLUFF, NEBRASKA

REPLY BRIEF OF PETITIONERS

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 402

OWEN A. FRANK AND DOROTHEA FRANK,
Petitioners,

vs.

COUNTY OF SCOTTS BLUFF, NEBRASKA

REPLY BRIEF OF PETITIONERS

Argument

The only issue presented by respondent in its brief is whether or not the Federal question was timely raised. It is tacitly conceded that the question was raised in a proper manner. It is not urged that the question is unsubstantial. The argument advanced by respondent is so misleading as to require the filing of a reply brief.

Respondent's entire contention is based on the first two syllabi of the opinion of the Nebraska Supreme Court as set out on page six of its brief. It entirely ignores the fact that these rules are applicable only to decrees which are erroneous merely as contrasted to decrees which are absolutely void.

The case at bar involved a *collateral* attack on the decree, and a *direct* attack on the sale of the land, the decree con-

firming said sale and the decision of the Nebraska Supreme Court affirming said decree. None of the cases cited by the court provide justification for the refusal by the Nebraska courts to give petitioners the benefits conferred upon all citizens of Nebraska by the provisions of Section 77-2045, C. S. 1929. None of said cases involved any question of the jurisdiction of the court to enter the decree of foreclosure. In none was the judgment or decree preceding the sale attacked as void for want of jurisdiction. In all of these cases the decree ordering the sale was attacked merely as erroneous or irregular. The same is true of the cases cited in support of the second syllabus. Therefore, the rules announced in all of these cases, and stated in the syllabi in the present case on the second appeal herein, are subject to the limitation that said rules presuppose the existence of a valid decree, which the court had *jurisdiction* to enter, and have no application whatsoever in any case where the face of the record affirmatively shows the decree to be absolutely void for lack of jurisdiction of the court to enter such decree.

The *Acton* case demonstrates this beyond cavil. In it, as in this case, the decree was attacked *for the first time* on objection to confirmation of sale. The decree had become final for failure to appeal therefrom. Nevertheless, the Supreme Court of Nebraska *went back of the decree* under circumstances identical with those in this case, and sustained the appellant's *collateral* attack on said decree.

Since the decree herein is collaterally attacked, it follows that the attack was made in time, and it was unnecessary that the invalidity of the decree be raised prior to its entry by the trial court or on the appeal therefrom. It is axiomatic that a void decree is a nullity and may be collaterally attacked at any time.

Petitioners take issue with the assertion of respondent (Brief, p. 9) that the statute set out therein forecloses the

attack made by petitioners on the proceedings subsequent to the decree. Respondent there states that the statute limits the scope of inquiry on objections of confirmation to, among other things, questions relating to the regularity of the officer conducting the sale. Certainly when petitioners object to the officer selling the land in one tract in violation of the statute, they are raising a question related to the regularity of the proceedings of the officer conducting the sale. It therefore follows that there is no merit in respondent's contention (Brief, p. 10) that petitioners are asking this Court to issue a mandate directing the Supreme Court of Nebraska "to violate a local procedural statute, against which no complaint of invalidity has been made." Neither are petitioners asking this Court "to set aside its many decisions announcing a principle of practice uniformly adhered to throughout the history of the State, and grant relief to petitioners when it has uniformly refused relief to others in identical circumstances." On the contrary, petitioners are asking this Court to direct the Nebraska Supreme Court to follow the Nebraska statutes, to follow its former decisions which have not been overruled, and to grant petitioners the same relief which the court has extended to other citizens of the State in every case heretofore presented to the Nebraska Supreme Court (cf. *City of Scottsbluff* v. *Acton, Taylor* v. *Evans,* Sec. 77-2045, C. S. 1929).

On pages 3 and 5 of its brief, respondent suggests that there might have been other evidence before the trial court which would support a finding that the land was assessed as one tract rather than separately assessed. (Had there been any such evidence respondent should have called it to this Court's attention in its brief.) This case will be examined on the record before the court, and this Court will not speculate on what other evidence *might* have been before the trial court. Furthermore, records relating to

the assessment of taxes and the acts of the tax officers in the premises are conclusive and not subject to impeachment by parol evidence (22 C. J. 1085, Sec. 1428). The best and primary evidence of the fact, nature and amount of assessment is the assessment book or list itself (61 C. J. 622, Sec. 27). The assessment records herein are in the printed record (R. 32-44). The court will therefore not assume that the records were impeached at the trial by extraneous evidence not in the printed record.

On page 5 of its brief, respondent complains that no motion for rehearing was filed on the first appeal "while the Supreme Court of Nebraska had jurisdiction of the cause and the power to correct any errors it might have made in its decision," and states "The record thus fails to show that any Federal question relating to the validity of the decree of the trial court or the opinion and judgment of the Supreme Court was ever before that court while, in accordance with State practice, it was proper for that court to entertain and decide it." (Italics ours.) The utter fallacy of such a contention lies in that it completely overlooks the fact that the attack on the decree itself was collateral; certainly the attack on the proceedings subsequent thereto, including the sale and its confirmation, were made while both the trial and the Supreme Court had jurisdiction of such proceedings on direct attack. The statement quoted from the Nebraska Supreme Court's opinion on page 9 of respondent's brief, "Defendants attack here *is not upon the proceedings had subsequent to the decree,* but upon the decree itself, and upon the questions of fact and law that were determined in the decree. They are not reviewable upon objections to the confirmation of the sale" is contrary to the record. See assignments of error numbered 1, 2, 7, 8, 9 (R. 28, 29), all of which are directed to the proceedings subsequent to the decree.

There are only two reasons why the opinion on the first appeal need be examined by this Court. First, to determine whether the court was without jurisdiction to enter such decree and whether, therefore, the decree is subject to collateral attack; second, whether the questions raised in the second appeal, by collateral attack on the decree, and by direct attack on the proceedings subsequent thereto, were before the court in the former appeal and therein decided. We respectfully submit that these questions must be resolved in favor of petitioners' contentions herein.

On pages 2 and 3 of its brief, respondent undertakes to state the issues decided by the trial court. It may be pointed out that respondent's discussion is directed to the proceedings on the first trial, in which the decree was entered, and not to the hearing on confirmation. The only question there decided was that although the two descriptions of the two 75.2-acre tracts were identical and interchangeable, to-wit (Pt. NW¼, Sec. 24, Twp. 22, Range 55, 75.2 acres and Pt. NW¼, Sec. 24, Twp. 22, Range 55, 75.2 acres) (R. 32-44 and 52), yet such descriptions were sufficient to identify each tract. We challenge the correctness of respondent's assertion (Brief, p. 3) that the trial court also found that the assessment "had in fact been made against a single tract listed upon the tax records on two lines." No such finding is in the record.

Respondent asserts (Brief, p. 5) that petitioners' counsel "overlook the court's discussion of both the local case law and statute law as applied to the distinguishing facts of this case." Counsel, on the contrary, have pointed out in their brief that the distinction attempted by the Nebraska Supreme Court is arbitrary and without ground, and is an attempt to evade the constitutional question raised by petitioners.

Respondent also asserts (Brief, p. 7) that the discussion of the Nebraska Supreme Court, in its opinion on the

second appeal (R. 49, 50), of the constitutional question was "purely dictum." Petitioners raised the Federal question on that appeal. The court rejected their contention and held that no constitutional right had been denied them. In *Richmond Screw Anchor Co.* v. *U. S.*, 48 S. Ct. 194, 275 U. S. 331, 72 L. Ed. 303, this Court held that the reason for a court's conclusion is not obiter dictum merely because another reason was more fully argued and considered. And in *U. S.* v. *Title Insurance & Trust Co.*, 44 S. Ct. 621, 26 U. S. 472, 68 L. Ed. 1110, the court held that where there were two grounds on either of which an appellate court may rest its decision and it adopts both, the ruling on neither is obiter, but each is the judgment of the court.

Be that as it may, if the court did decide the Federal question, which it did, its decision deprived petitioners of their constitutional rights; if it did not decide it, the failure to do so likewise deprived them of such rights, there being no question that the question was timely and properly presented.

John v. *Paullin* (Respondent's Brief, p. 7) is not in point. The Supreme Court of Oklahoma did not pass on the merits of the case, but merely held that it had no jurisdiction because the procedural statutes governing appeals had not been complied with. No such question is here involved.

Nor is the case of *Atlantic C. L. R. Co.* v. *Minis* cited by respondent in point. The constitutional rights were timely and properly claimed by petitioners under the Nebraska practice. Petitioners, with reluctance, are compelled to the conclusion that the decision of the Nebraska court denying them their constitutional rights was clearly "rendered in a spirit of evasion for the purpose of defeating the claim of Federal right."

Conclusion

When a judgment is absolutely void for want of jurisdiction of the court to enter it, it may be attacked directly or by collateral attack. The right to collateral attack is not lost by failure to make a direct attack. For the purpose of collateral attack, a court never loses jurisdiction. The attack on the sale and its confirmation could not be made until after the sale and confirmation. Even if the decree were not subject to collateral attack, the attack on the sale and confirmation is not collateral, but direct. The sale and confirmation deprived petitioners of their asserted constitutional rights fully as much, if not more so, than the decree itself. It follows therefore that the Federal question was timely presented. Thus, the only objection to this Court's jurisdiction, being wholly without merit, it is respectfully submitted that a writ of certiorari should be granted as prayed for.

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